Affirmed and Opinion filed May 17, 2001.

In The

Fourteenth Court of Appeals

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NO. 14-98-00469-CR

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MICHAEL CADETT MAPES, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 176th District Court
Harris County, Texas
Trial Court Cause No. 766,227

O P I N I O N

Appellant, Michael Cadett Mapes, was charged with felony possession of a controlled substance. Appellant entered a plea of guilty to the offense without an agreed punishment recommendation from the state. In eight points of error, appellant contends his conviction should be reversed. We affirm.

Jurisdiction

The State argues this Court does not have jurisdiction in this cause because appellant

did not timely file his notice of appeal because he did not timely file a motion for new trial.

In order to extend the appellate deadlines and make the filing of his notice of appeal timely, appellant's motion for new trial would have to be filed thirty days after January 30, 1998, which was the date the judgment was signed in this case. *See* TEX. R. APP. P. 26.1; *Garcia v. State*, 29 S.W.3d 899, 900 (Tex. App.—Houston [14th Dist.] 2000, no pet.). In a supplemental clerk's record, the district clerk's office filed an affidavit showing appellant's motion for new trial was filed on February 26, 1998. Accordingly, because there was a timely filed motion for new trial, appellant has properly perfected his appeal.

Involuntary Plea

In his first point of error, appellant argues the trial court erred by violating his due process rights under the Texas Constitution by threatening him with a longer period of incarceration if he refused the trial court's plea bargain offer, thus rendering his plea involuntary.

The evidence supporting appellant's contentions is presented in several narratives of what allegedly occurred in the trial court, which are contained several bills of exception. Before considering this evidence, we must determine whether appellant followed the appropriate procedures to submit his bills of exception.

Appellate Rule 33.2(c) sets out the following procedures for filing a bill of exception:

> (c) Procedure.
>
> (1) The complaining party must first present a formal bill of exception to the trial court.
>
> (2) If the parties agree on the contents of the bill of exception, the judge must sign the bill and file it with the trial court clerk. If the parties do not agree on the contents of the bill, the trial judge must--after notice and hearing--do one of the following things:
>
> (A) sign the bill of exception and file it with the trial court clerk if the judge finds that it is correct;

(B) suggest to the complaining party those corrections to the bill that the judge believes are necessary to make it accurately reflect the proceedings in the trial court, and if the party agrees to the corrections, have the corrections made, sign the bill, and file it with the trial court clerk; or

(C) if the complaining party will not agree to the corrections suggested by the judge, return the bill to the complaining party with the judge's refusal written on it, and prepare, sign, and file with the trial court clerk such bill as will, in the judge's opinion, accurately reflect the proceedings in the trial court.

(3) If the complaining party is dissatisfied with the bill of exception filed by the judge under (2)(C), the party may file with the trial court clerk the bill that was rejected by the judge. That party must also file the affidavits of at least three people who observed the matter to which the bill of exception is addressed. The affidavits must attest to the correctness of the bill as presented by the party. The matters contained in that bill of exception may be controverted and maintained by additional affidavits filed by any party within ten days after the filing of that bill. The truth of the bill of exception will be determined by the appellate court.

TEX. R. APP. P. 33.2(c).

As in a hearing on a motion for new trial, it is the duty of counsel to request a hearing on the bill of exceptions before the trial court loses jurisdiction to determine the matter. *See, e.g., Grimes v. State*, 171 Tex. Crim. 298, 299, 349 S.W.2d 598, 599 (1961). Stated differently, a trial court is not required to convene a hearing on a bill of exceptions absent a request by the movant for such a hearing. *See also Ryan v. State*, 937 S.W.2d 93, 96-97 (Tex. App.—Beaumont 1996, pet. ref'd); *Johnson v. State*, 925 S.W.2d 745, 747-49 (Tex. App.—Fort Worth 1996, pet. denied); *Brooks v. State*, 894 S.W.2d 843, 845 (Tex. App.—Tyler 1995, no pet.) (A "trial court is not required to convene a hearing for a motion for new trial absent a request by the movant for such a hearing."). Here, the record does not reflect appellant properly requested a hearing on the bill of exceptions. Because appellant did not request a hearing on his bill of exceptions, the trial court did not err in failing to hold the hearing.

Thus, because the bill of exception procedures were not followed, appellant has not presented this court with any evidence to sustain his substantial burden in showing his plea was involuntary. *See Fuentes v. State*, 688 S.W.2d 542, 544 (Tex. Crim. App. 1985). Accordingly, we overrule his first point of error.

Ineffective Assistance of Counsel

In his second and third points of error, appellant argues his plea was involuntary due to ineffective assistance of counsel and he was denied any assistance of counsel during the appellate process.

Both the federal and state constitutions guarantee an accused the right to have the assistance of counsel. *See* U.S. CONST. AMEND. VI; TEX. CONST. Art. I, § 10; TEX. CODE CRIM. PROC. art. 1.05 (Vernon 1977). The right to counsel includes the right to reasonably effective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052 (1984); *Ex parte Gonzales*, 945 S.W.2d 830, 835 (Tex. Crim. App. 1997). Both state and federal claims of ineffective assistance of counsel are evaluated under the two prong analysis articulated in *Strickland*. *See Thompson v. State*, 9 S.W.3d 808, 812 (Tex. Crim. App. 1999); *Stults v. State*, 23 S.W.3d 198, 208-09 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd). The first prong requires the appellant to demonstrate that trial counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. *See Strickland*, 466 U.S. at 688, 104 S.Ct. 2052. To satisfy this prong, the appellant must (1) rebut the presumption that counsel is competent by identifying the acts and/or omissions of counsel that are alleged as ineffective assistance and (2) affirmatively prove that such acts and/or omissions fell below the professional norm of reasonableness. *See McFarland v. State*, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996). The reviewing court will not find ineffectiveness by isolating any portion of trial counsel's representation, but will judge the claim based on the totality of the representation. *See Thompson*, 9 S.W.3d at 813.

The second prong of *Strickland* requires the appellant to show prejudice resulting from the deficient performance of his attorney. *See Hernandez v. State*, 988 S.W.2d 770, 772 (Tex. Crim. App. 1999). To establish prejudice, the appellant must prove there is a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. *See Jackson v. State*, 973 S.W.2d 954, 956 (Tex. Crim. App. 1998). A reasonable probability is "a probability sufficient to undermine confidence in the outcome of the proceedings." *Id*. The appellant must prove his claims by a preponderance of the evidence. *See id.*

In any case analyzing the effective assistance of counsel, we begin with the strong presumption that counsel was competent. *See Thompson*, 9 S.W.3d at 813; *Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994) (en banc). We presume counsel's actions and decisions were reasonably professional and were motivated by sound trial strategy. *See Jackson*, 877 S.W.2d at 771. The appellant has the burden of rebutting this presumption by presenting evidence illustrating why trial counsel did what he did. *See id.* The appellant cannot meet this burden if the record does not specifically focus on the reasons for the conduct of trial counsel. *See Stults*, 23 S.W.3d at 208; *Osorio v. State*, 994 S.W.2d 249, 253 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd). This kind of record is best developed in a hearing on an application for a writ of habeas corpus or a motion for new trial. *See Stults*, 23 S.W.3d at 209; *see also Jackson*, 973 S.W.2d at 957 (stating that when counsel is allegedly ineffective because of errors of omission, collateral attack is the better vehicle for developing an ineffectiveness claim).

When the record is silent as to counsel's reasons for his conduct, finding counsel ineffective would call for speculation by the appellate court. *See Gamble v. State*, 916 S.W.2d 92, 93 (Tex. App.—Houston [1st Dist.] 1996, no pet.) (citing *Jackson v. State*, 877 S.W.2d at 771). An appellate court will not speculate about the reasons underlying defense counsel's decisions. For this reason, it is critical for an accused relying on an ineffective assistance of

counsel claim to make the necessary record in the trial court. Even though the appellant may file a motion for new trial, failing to request a hearing on a motion for new trial may leave the record bare of trial counsel's explanation of his conduct. *See Stults*, 23 S.W.3d at 208; *Gibbs v. State*, 7 S.W.3d 175, 179 (Tex. App.—Houston [1st Dist.] 1999, pet. ref'd). If there is no hearing, or if counsel does not appear at the hearing, an affidavit from trial counsel becomes almost vital to the success of an ineffective assistance claim. *See Howard v. State*, 894 S.W.2d 104, 107 (Tex. App.—Beaumont 1995, pet. ref'd).

To be constitutionally valid, a guilty plea must be knowing and voluntary. *See* TEX. CODE. CRIM. PROC. ANN. art. 26.13(b) (Vernon 1989); *Brady v. United States*, 397 U.S. 742, 749, 90 S. Ct. 1463, 25 L. Ed.2d 747 (1970). In determining the voluntariness of a plea, the entire record must be considered. *See Williams v. State*, 522 S.W.2d 483, 485 (Tex. Crim. App. 1975). A guilty plea is voluntary if it is an intelligent admission that the accused committed the offense. *See McGowin v. State*, 912 S.W.2d 837, 839 (Tex. App.—Dallas 1995, no pet.). When the record shows that the trial court admonished the defendant in substantial compliance with article 26.13 of the *Texas Code of Criminal Procedure*, the State establishes a prima facie showing that the plea was knowing and voluntary. *See* TEX. CODE CRIM. PROC. ANN. art. 26.13(c); *Crawford v. State*, 890 S.W.2d 941, 944 (Tex. App.—San Antonio 1994, no pet.). The burden then shifts to the defendant to show that he pleaded guilty without understanding the consequences of his guilty plea, and as a result, suffered harm. *See Fuentes v. State*, 688 S.W.2d 542, 544 (Tex. Crim. App. 1985).

When a defendant enters a plea of guilty based upon the advice of counsel and subsequently challenges the voluntariness of that plea based upon ineffective assistance of counsel, the voluntariness of such plea depends upon whether his trial attorney's advice was within the wide range of competence demanded of attorneys in criminal cases and, if not, whether there is a reasonable probability that, but for his trial attorney's alleged error, the defendant would not have pleaded guilty, but would have insisted on going to trial. *See Kober*

v. State, 988 S.W.2d 230, 232 (Tex. Crim. App. 1999).

Here, appellant has not provided us, and we cannot find, how his counsel was ineffective. Also, appellant does not identify anything his trial attorney should have done to assist him in perfecting the appeal, and he does not suggest that any such — otherwise unmentioned — action would have been meritorious in his behalf. Thus, there is nothing in the record to support either of appellant's ineffective assistance of counsel claims. Accordingly, we overrule appellant's second and third points of error.

Bill of Exceptions Hearing

In his fourth point of error, appellant argues the trial court erred by failing to hold a hearing on his bill of exceptions. We disagree. Appellate Rule 33.2(c)(2) requires the judge to hold a hearing on a bill of exception if he or she does not agree with the statement of facts in the bill. In a bond hearing after the guilty plea, the trial court told appellant to "set up some hearing date for [the] bill of exception next week." As we previously discussed under the first point of error, appellant did not properly request a hearing on the bill of exceptions. Accordingly, we overrule his fourth point of error.

Recusal

In his fifth point of error, appellant argues the trial court erred by not recusing himself from the hearing on appellant's bill of exceptions. Civil Procedure Rule 18a governs the procedure for the recusal of judges in criminal cases. *See* TEX. R. CIV. P. 18a; *Soderman v. State*, 915 S.W.2d 605, 608 (Tex. App.—Houston [14th Dist.] 1996, pet. ref'd untimely filed) (citing *Arnold v. State*, 853 S.W.2d 543, 544 (Tex. Crim. App. 1993)). Absent any constitutional prohibitions, Rule 18a(a) requires a motion to recuse to be filed at least 10 days before the date set for trial. Failure to comply with this notice requirement waives any appellate complaint. *Id*. Thus, having failed to file a timely recusal motion, appellant waived his complaint. Accordingly, we overrule his fifth point of error.

Motion for New Trial Hearing

In his sixth point of error, appellant argues the trial court erred by denying appellant a hearing on his motion for new trial. As we have previously discussed, a trial court is not required to convene a hearing on a motion for new trial absent a request by the movant for such a hearing. *Brooks*, 894 S.W.2d at 845; *see Ryan*, 937 S.W.2d at 96-97; *Johnson*, 925 S.W.2d at 747-49. However, even if appellant had properly requested a hearing on his motion for new trial, the denial of this hearing would not be error because the motion's allegations were determinable from the record. *See Reyes v. State*, 849 S.W.2d 815, 819 (Tex. Crim. App. 1993) (A "hearing is *not* required when the matters raised in the motion for new trial are subject to being determined from the record.") (emphasis in original); *Bumpers v. State*, 509 S.W.2d 359, 363 (Tex. Crim. App. 1974); *Hubbard v. State*, 912 S.W.2d 842, 844 (Tex. App.—Houston [14th Dist.] 1995, no pet.). Thus, because appellant did not properly request a new trial hearing, we overrule his sixth point of error.

In Pari Materia

In his seventh point of error, appellant contends the trial court erred by convicting him under the wrong statute. Appellant was convicted of the felony offense of possession of a controlled substance. *See* TEX. HEALTH & SAFETY CODE ANN. § 485.115. Appellant claims he should have been convicted of the offense of possession of drug paraphernalia. *See* TEX. HEALTH & SAFETY CODE ANN. §§ 481.125 and 481.183(b)(2).

Two statutes concerning the same general subject matter, same persons or class of persons, or same general purpose are considered to be *in pari materia* and should be construed, to the extent possible, in harmony. *Cheney v. State*, 755 S.W.2d 123, 126 (Tex. Crim. App. 1988); *Findlay v. State*, 9 S.W.3d 397, 399 (Tex. App.—Houston [14th Dist.] 1999, no pet.). If a general statute and a specific statute both proscribe a defendant's conduct, he should be charged under the more specific statute. *Id.* If the statutes contain irreconcilable

conflicts in elements of proof or penalties for the same conduct, then the more specific statute controls. *Rodriguez v. State*, 879 S.W.2d 283, 285 (Tex. App.—Houston [14th Dist.] 1994, pet. ref'd.). The doctrine is codified in the Code Construction Act, which provides:

> (a) If a general provision conflicts with a special or local provision, the provisions shall be construed, if possible, so that effect is given to both.
>
> (b) If the conflict between the general provision and the special or local provision is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later enactment and the manifest interest is that the general provision prevail.

TEX. GOV'T CODE ANN. § 311.026 (Vernon 1988).

The *in pari materia* rule, however, "is not applicable to enactments that cover different situations and that were apparently not intended to be considered together." *Cheney*, 755 S.W.2d at 126. Therefore, our initial focus should be on whether the two statutes are indeed *in pari materia*. *Id*. at 127. There are three factors to consider when making this determination: persons, subject matters, and purposes. *Id.*; *Findlay*, 9 S.W.3d at 399.

The two statutes in question have been determined to not be *in pari materia* by the Texarkana Court of Appeals, which explained:

> The State correctly argues that Section 4.04 [TEX. HEALTH & SAFETY CODE ANN. § 485.115] and Section 4.07 [TEX. HEALTH & SAFETY CODE ANN. § 485.125] of the Controlled Substances Act are not in pari materia because the two statutes do not have the same purpose or object. Section 4.07 (possession of drug paraphernalia) is an offense to discourage the production and possession of items that are to be used to facilitate the taking of drugs, while the more serious offense of Section 4.04 (possession of a controlled substance) punishes those that possess the final product. Unlike Section 4.04, Section 4.07 does not require possession of any controlled substance.

Taylor v. State, 805 S.W.2d 609, 611 (Tex. App.—Texarkana 1991, no pet.).

We agree with the Texarkana Court that these two statutes are not *in pari materia*. *See Mayes v. State*, 831 S.W.2d 5, 9 (Tex. App.—Houston [14th Dist.] 1992, no pet.); *see also Sims v. State*, 833 S.W.2d 281, 285 (Tex. App.—Houston [14th Dist.] 1992, pet. ref'd) (citing with approval *Taylor*, 805 S.W.2d at 611)). Thus, because the statutes are not *in pari materia*, the State was permitted to charge appellant with an offense under either statute. *See Burke v. State*, 28 S.W.3d 545, 549 (Tex. Crim. App. 2000). Accordingly, appellant's seventh point of error is overruled.

Plea Negotiations

In his eighth and final point of error, appellant contends the trial court erred by "usurping the Assistant District Attorney's role in the plea bargaining process." However, appellant has provided no evidence to show that the trial judge took part in plea negotiations in the instant case. *See Doyle v. State*, 888 S.W.2d 514, 517-18 (Tex. App.—El Paso 1994, pet. ref'd); *Coleman v. State*, 756 S.W.2d 347, 349 (Tex. App.—Houston [14th Dist.] 1988, no pet.). In fact, the evidence in the record is that appellant was given the opportunity to comment on any such coercion, and he failed to make mention of any judicial coercion of his guilty plea. Thus, appellant's eighth point of error is overruled.

Having overruled all of appellant's points of error, we affirm the judgment of the trial court.

/s/ Ross A. Sears
Justice

Judgment rendered and Opinion filed May 17, 2001.

Panel consists of Justices Sears, Draughn, and Amidei.*

Do Not Publish — TEX. R. APP. P. 47.3(b).

* Senior Justices Ross A. Sears, Joe L. Draughn, and Former Justice Maurice Amidei sitting by assignment.